COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

NOBLE VISTA DEVELOPMENT, LLC, Appellant	)	
v.	)	No. 05-27
UPTON BOARD OF APPEALS, Appellee	)	

RULING ON MOTIONS TO DISMISS
AND
MOTIONS FOR SUMMARY DECISION

This appeal concerns a proposal by Noble Vista Development, LLC (developer) to build mixed-income affordable housing off Hartford Avenue in Upton. The developer intends to build the housing under a Comprehensive Permit issued pursuant to G.L. c. 40B, §§ 20-23. The complicated history of this proposal, described below, bears on the resolution of the preliminary motions submitted by the parties.

I. HISTORY

In 2000, Noble Vista Development, LLC received preliminary funding approval under the New England Fund (NEF) of the Federal Home Loan Bank of Boston (FHLBB) to build 274 condominium units. Second Ruland Affidavit, Exh. 1-A. Negotiations between the developer and the Upton Board of Selectmen (Selectmen) ensued, and in 2001 they reached an agreement to proceed with a joint proposal for a smaller, 150-unit development under the state Local Initiative Program (LIP). Second Ruland Affidavit, Exh. 1. On August 31, 2001, the formal LIP application was signed by the Selectmen for submission to

the state Department of Housing and Community Development (DHCD). First Ruland Affidavit, ¶ 2. In December, DHCD approved the LIP proposal, and on January 22, 2002, the developer submitted an application to the Upton Zoning Board of Appeals (Board) for a Comprehensive Permit to build the housing. First Ruland Affidavit, ¶ 3. After public hearings, the Board voted to grant a comprehensive permit, and on September 11, 2002, it filed its decision with the Upton Town Clerk.

The developer appealed the Board's decision to this Committee, alleging that certain of the conditions imposed by the Board rendered the building or operation of the housing uneconomic. The developer and the Board entered into negotiations, however, and resolved their differences, entering into an agreement that was approved by this Committee in a Decision on Stipulation dated March 18, 2003. See First Ruland Affidavit, Exh. A. Pursuant to the agreed-upon comprehensive permit, the developer began roadway and utility construction. First Ruland Affidavit, ¶ 5.

In September 2005, the developer proposed several relatively minor project changes, which it submitted as a Notice of Project Change to both DHCD and the Selectmen for approval. First Ruland Affidavit, ¶¶ 6, 8 and Exh. B. In early November, DHCD approved the changes. First Ruland Affidavit, ¶ 7. Later in November, the developer submitted a Notice of Project Change to the Board for approval of the same changes, and the Board approved them in December. First Ruland Affidavit, ¶ 9 and Exh. D.

Meanwhile, however, the Selectmen sought to impose eight additional conditions on the proposed development. First Ruland Affidavit, ¶ 8 and Exh. C. Although the developer agreed to accept some of those conditions, a stalemate was reached at a Selectmen's meeting on December 13, 2005. First Ruland Affidavit, ¶ 10. Therefore, on December 19, the developer filed a second appeal with this Committee (the current appeal) requesting a determination that approval of the Notice of Project Change by the Selectmen is unnecessary and that the approval of those changes by the Board is effective, so that construction may continue. After a meeting on December 20, by letter of December 22, 2005, the Selectmen notified DHCD that they could no longer support the project. Second Amended Initial Pleading, Exh. F. On January 24, 2006, the developer notified the Board that it intended to

change the underlying subsidy program from LIP to the original NEF funding it had obtained. Second Ruland Affidavit, ¶ 2; Second Amended Initial Pleading, Exh. G. On February 1, 2006, the Board denied this Notice of Project Change without prejudice. Second Ruland Affidavit, Exh. 3.

Following a conference of counsel in the current appeal, the parties filed several preliminary motions. The Board moved to dismiss the Initial Pleading, as amended[1] pursuant to 760 CMR 30.07(3) asserting that the Committee has no jurisdiction to preside over disputes between developers and Boards of Selectmen, and that the proposed housing is no longer fundable as required by 760 CMR 31.01(b). The developer, in turn, pursuant to 760 CMR 30.07(4), filed a Motion for Summary Decision, requesting a determination that the Selectmen's approval is not necessary for a Notice of Project Change, that they had no authority to impose additional conditions, and that they cannot revoke their support for the LIP.

After the Board denied its Second Notice of Project Change regarding the change in subsidy from the LIP to the NEF, the developer promptly moved to amend its initial pleading again to include an appeal of this action. The Board filed an opposition to this motion as well as a second motion to dismiss, renewing its claim that the Committee lacks subject matter jurisdiction regarding the Selectmen's actions, and arguing that the developer had failed to comply with applicable regulations in connection with the Second Notice of Project Change. The developer then filed a second motion for summary decision on the issue of the denial of the change in funding source for the project. The developer has filed affidavits and exhibits in support of its motions and in opposition to the Board's motions.[2] The Board has also submitted exhibits in support of its positions on all pending motions.

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1. The developer filed its Amended Initial Pleading immediately after the commencement of the appeal. No dispute exists regarding this first substitution.

2. The first affidavit was dated February 2, 2006, and filed in connection with the developer's first motion for summary decision. A second affidavit, dated February 20, 2006, was filed in opposition to the Board's first motion to dismiss. They are referred to as the "First Ruland Affidavit" and the "Second Ruland Affidavit."

The developer also moved for "expedited treatment of this matter." There is no formal provision in our regulations for such treatment, but our practice has been to expedite cases, in the presiding officer's discretion, when the circumstances warrant.

The developer has pursued two different theories in this appeal. As noted above, it first addressed the Selectmen's power to modify a LIP proposal or to withdraw their support entirely. The developer's second argument, added in the Second Amended Initial Pleading, is that it should be permitted to proceed with the project under the NEF instead of LIP. In its Request for Entry of Summary Decision (opposed by the Board), the developer takes the position that a grant of summary decision on the subsidy change would moot the issues concerning the role of the Selectmen and the LIP program. My ruling on this second issue is sufficient to permit this proposal to proceed to construction. However, as the Board's motions to dismiss raise the question of the Committee's jurisdiction to review the actions of the Selectmen, and to ensure the clarity of the record, I address the issue here.

II. JURISDICTION TO REVIEW THE LIP ISSUES

In the Board's first motion to dismiss, it argues that the Committee "has no jurisdiction "to invade a (sic) Selectmen's unfettered authority to make determinations as to LIP endorsements." Motion to Dismiss (filed Feb. 2, 2006), p. 4. On the surface, this argument is attractive since this Committee has traditionally been inclined to defer to subsidizing agencies in their decisions to issue project eligibility determinations as well as on the question of ongoing fundability. See, e.g., *Farmview Affordable Homes, LLC v. Sandwich,* No. 02-32, slip op. at 2-5 (Mass. Housing Appeals Committee Ruling May 21, 2004). However, there is ample precedent for the proposition that it is our obligation to resolve disputes between developers and Boards of Appeals concerning fundability. For instance, in *Little Hios Hills Realty Tr. v. Plymouth*, No. 92-02 (Mass. Housing Appeals Committee Sep. 23, 1993), the local board of appeals had denied a comprehensive permit, and the board of selectmen withdrew its support from the LIP proposal while the matter was on appeal to this Committee. Based upon a written response concerning the case from the subsidizing agency (stating that the board of selectmen's vote to withdraw their sponsorship puts "an end to the project's inclusion and qualification for the Local Initiative Program," *id.*

The motion also included a request for an evidentiary hearing. Such a hearing may be held in the discretion of the presiding officer. 760 CMR 30.07(1)(a). I believe that it is unnecessary and deny the request.

at 4, 7), we found that the proposal was no longer fundable. *Id.* at 7-8.[3] In that case, and under the circumstances here, it is within our power to rule on the question of fundability under 760 CMR 31.01(1)(b), 31.01(2)(f), and 31.01(5). That is, in this case, we would have the power to determine the legal effect that actions of the Selectmen might have on the comprehensive permit issued by the Board (or on the Board's jurisdiction and our own to hear this matter), but we could make that determination without asserting jurisdiction over the Selectmen.[4] In any case, however, not only does the Committee not assert jurisdiction over the Selectmen, but in addition, as will be seen below, my ruling is based upon grounds other than the effect of the Selectmen's actions. The motions to dismiss are denied with respect to this jurisdictional issue.

III. THE DEVELOPER'S PROPOSED CHANGE FROM THE LIP TO THE NEF

By its motion to amend its initial pleading, the developer seeks to add Committee review of the Board's denial of the Second Notice of Project Change concerning the change in subsidy program. As shown below, the Board's opposition, based on an alleged failure to comply with applicable regulations, does not warrant denial of the motion. The motion to amend the initial pleading is granted.

A. The Change from LIP to the NEF is an Insubstantial Change.

As described above, on January 24, 2006, the developer notified the Board that it intended to change the underlying subsidy program from LIP back to the original NEF subsidy for which it first had obtained approval in 2000. This change was denied "without

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3. The facts in the current case may require the opposite result since local support was withdrawn after the comprehensive permit was issued and construction begun. Here, however, the factual circumstances surrounding the withdrawal of support in this case are complicated. Similarly, the legal issues are complex, particularly since it appears that LIP Guidelines were modified after our *Little Hios Hills* decision in order to provide guidance with regard to the question of withdrawal of local support. I see no need to address these issues now. Should this matter be appealed further and the reasoning below with regard to the developer's claim under the NEF subsidy be found wanting, the record with regard to LIP subsidy could be developed more thoroughly on remand.

4. On the other hand, if the Selectmen had felt that it was in their interest to participate in these proceedings, they could have requested to participate as interested persons or full interveners pursuant to 760 CMR 30.04.

prejudice" by the Board.[5] The denial of such a change may be appealed to this Committee. 760 CMR 31.03(3)(d). If I, as the presiding officer, rule "that the change is insubstantial, the comprehensive permit shall be deemed modified...."[6] *Id.* Commentary and examples are provided in the regulations to guide that ruling. 760 CMR 31.03(2).

A change in subsidy program alone is not normally a substantial change. 760 CMR 31.03(2)(b)(5). In this case, the developer stated clearly in its request for the change that it does not seek "any other change to the Project or its numerous permit conditions," that is, the conditions imposed by the Board in the comprehensive permit. Second Ruland Affidavit, Exh. 1, p. 3.

The Board's stated reason for denying the change was that "under 760 CMR 31.01(4), the proposed change in the source of subsidy requires a new [project eligibility] determination by MassHousing...." Second Ruland Affidavit, Exh. 3. However, the Board's argument that the developer abandoned the original subsidy source is belied by the record which demonstrates that the developer sought and obtained renewals of the original project eligibility determination. Second Ruland Affidavit, ¶ 3 and exhibits attached thereto. Therefore, as described below, the developer already had a valid project eligibility determination under the NEF, and we know of no authority that supports the Board's position that a new one was required. Rather, the clear implication of our regulations and our precedents is that such changes should be permitted unless there is an important local concern at stake. See *Owens v. Belmont*, No. 89-21, slip op. at 15, (Mass. Housing Appeals Committee, Jun. 25, 1992) (no local reapplication necessary when subsidy program

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5. It is of no consequence in this instance that the Board appears to have failed to comply with the provisions of 760 CMR 31.03(3)(a), which requires a threshold determination of whether the requested change is substantial, and only if it is substantial, then a hearing to determine whether or not to grant the change.

6. The clear language of § 31.03(3)(d) indicates that rulings on changes made after the issuance of a permit are to be made by the presiding officer, and thus do not require consideration by the full Housing Appeals Committee. This provision is consistent with the section of our regulations that grants to the presiding officer "all powers conferred upon the Committee for conduct of a hearing." 760 CMR 30.09(5)(b). Of course, that section goes on to indicate that except in certain areas (enforcement of the Committee's decisions, for example), the presiding officer has no power to "finally determine the proceedings." The ultimate issue in proceedings under the Comprehensive Permit Law is whether or not a comprehensive permit should be issued. Thus, since the ultimate issue in these proceedings was determined when the Board issued the permit, it is within the presiding officer's power to rule upon a project change after that.

changed); *CMA, Inc. v. Westborough,* No. 89-25, slip op. at 19-21 (Massachusetts Housing Appeals Committee Jun. 25, 1992) (discussion of policy underlying the regulation). I determine that the change in subsidy program from the LIP to the NEF was insubstantial. I hereby grant the developer's second motion for summary decision and deny the Board's second motion to dismiss.[7] Therefore the developer has a valid, modified comprehensive permit under the NEF, and may proceed with construction.[8]

B. Prior to Construction, the Proposal Must Satisfy the Program Administration Requirements that Apply to "New NEF" Proposals.

When the New England Fund (NEF) was created in the late 1990s, administrative oversight was limited. See *Stuborn Ltd. Partnership v. Barnstable,* No. 98-01, slip op. at 19 (Mass. Housing Appeals Committee Decision on Jurisdiction Mar. 5, 1999). Increased supervision was provided when the role of "project administrator" was established by amendments to the Comprehensive Permit Law regulations in 2002. See 760 CMR 31.01(2)(g), 31.09(3).[9] The new supervision requirements "apply to all applications for comprehensive permits that receive determinations of Project Eligibility... after July 22, 2002," 760 CMR 31.10, and such applications are commonly called "new NEF" proposals. This nomenclature is somewhat misleading, however, since it might lead one to infer that a new NEF program was created, whereas in fact, new requirements under the Comprehensive Permit Law were imposed on the existing NEF program. In any case, because the proposal that is before us here was first approved under the NEF in 2000, it would normally be subject

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7. The standard for the finding required of the presiding officer appears to be higher if the change is requested before a permit has actually been issued: 760 CMR 31.03(1) appears to require a finding both that the change is insubstantial and "that the applicant has good cause for not originally presenting such [change] details to the Board...." Even if that higher standard were applied here, the change should be permitted.

8 I also rule the developer's first motion for summary decision, as well as the questions raised by the Board's first motion to dismiss concerning fundability under the LIP, are therefore moot.

9. Section 31.01(2)(g) provides: "If project funding is provided though a non-governmental entity, a public or quasi-public entity authorized by the Department shall make the determination of Project Eligibility (Site Approval). The designated entity that issued the Project Eligibility (Site Approval) determination shall administer the project thereafter...." The designated public or quasi-public entity is commonly referred to as the "project administrator." In most cases, the project

only to the older, less stringent requirements. Because of the unusual history described below, however, I will require that the proposal be subject to the new, more exacting requirements.

The developer received a Project Eligibility letter from the Norwood Cooperative Bank (bank) dated November 15, 2000; this was for 274 condominium units. Second Ruland Affidavit, Exh. 1-A. That letter was updated April 25, 2001. Second Ruland Affidavit, Exh. 1-B. The Federal Home Loan Bank of Boston (FHLBB) notified the bank by letter of May 11, 2004 that project eligibility would expire May 28, 2004, but at the bank's request, the FHLBB extended the approval until May 31, 2005. Second Ruland Affidavit, Exh. 1-C, pp. 1-3. On October 13, 2005, the bank notified the FHLBB that the size of the project had been reduced to 150 units, and on October 25, 2005, at the bank's request, the FHLBB further extended the approval until November 30, 2006. Second Ruland Affidavit, Exh. 1-D, pp. 1-2.

Our regulations require that a project eligibility determination "be for a particular financing program." 760 CMR 31.01(4). In addition, they specifically permit a developer to "proceed under alternate financing programs...." *Id.* It may do so, however, only "if the application to the Board or appeal to the Committee so indicates and if full information concerning the project under the alternative financing arrangements is provided." *Id.*

The agreement entered into by developer and the Board in 2003 to settle the initial appeal stated very explicitly that the proposal was a LIP proposal, and not an NEF proposal. First Ruland Affidavit, Exh. AA, p. 3 (¶¶ 9, 11, 12). This was equally clear in later correspondence, and in the developer's initial pleading in this appeal. First Ruland Affidavit, Exh. B; Initial Pleading (filed Dec. 19, 2005), ¶¶ 7-10. Throughout the early stages of this appeal, in its motions and supporting memoranda, the developer referred to the proposal only as a LIP proposal. See, e.g., Appellants' [First] Motion for Summary Decision and memorandum of law in support (filed Feb. 3, 2006); also see First Ruland Affidavit, ¶¶ 2-4. The first notice that the developer desired to proceed under the NEF was in its request to the Board for a second project change. In its formal Notice of Project Change, the developer

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administrator is MassHousing (the Massachusetts Housing Finance Agency). Section 31.09(3) requires final written approval by the project administrator prior to construction.

described its purpose as "to provide a new subsidy source." Second Ruland Affidavit, Exh. 1, p. 1.

If the developer had chosen to pursue a comprehensive permit before the Board under both LIP and the NEF, the Board would have been required to consider both, and under 760 CMR 31.10 the application would have been considered one for approval under the older, less stringent requirements. Further, the Board would have been on notice because of our *Stuborn* decision and our regulations that it would have been wise to address programmatic concerns that were not addressed in the NEF. See *Stuborn Ltd. Partnership v. Barnstable,* No. 98-01, slip op. at 22-23 (Mass. Housing Appeals Committee Decision on Jurisdiction Mar. 5, 1999). The Board considered the application only under LIP. The first time that the NEF was raised as a "new subsidy source" was in 2006. Although this proposal's continuing eligibility for NEF funding is based upon a pre-2002 project eligibility determination, in order to provide additional protections to the town, I rule that the proposal shall be subject to the program administration requirements that apply to proposals approved after July 22, 2002.[10]

C. Possible Outstanding Issues

Finally, it appears that, at least in part, the current dispute arose due to policy disagreements between the parties concerning the LIP regulatory agreement. Presumably, these differences will now be resolved by the use of the standard housing affordability documents that are applied to all NEF developments. The Committee has not had the occasion to review those documents, but it would appear that the requirements in them should be left largely to the discretion of MassHousing as the project administrator. To the limited degree that one of the parties alleges that a requirement imposed by the project administrator is inconsistent with the Comprehensive Permit Law, the documents might have to be reviewed by the Committee, and, ultimately, the courts. Even though I expect that our

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10. Exactly how those requirements should be applied is within the discretion of the project administrator. This proposal obviously never received a determination of project eligibility from MassHousing as envisioned by 760 CMR 31.01(2)(g). Since construction has begun, and because final written approval from MassHousing must, "at a minimum, address each of the matters enumerated [in the earlier project eligibility process]," it would appear that what is required at this point is not a project eligibility determination, but rather "final written approval" under the customary standards. See 760 CMR 31.09(3); also see 760 CMR 31.01(2)(a) and (b).

role will be limited in that regard, this case will remain open on the Committee's docket to permit us to retain jurisdiction should such a need arise.

Since jurisdiction is retained only as an administrative convenience should further controversy develop in the future, this ruling constitutes a decision which may be reviewed in accordance with the provisions of G.L. c. 40B, § 22 and G.L. c. 30A by instituting an action in the Superior Court within 30 days of receipt of the decision.

Housing Appeals Committee

Date: July 13, 2006

Shelagh A. Ellman-Pearl
Presiding Officer